

2. Overview of Guide

General

This guide gives a broad overview of the issues involved in managing and enforcing mortgage security over property in England and Wales. It is designed in particular, for Irish lenders who have advanced loans on the security of property in England and Wales.

Most of the same considerations apply to mortgages and charges of property, irrespective of whether the security is the borrower's dwellinghouse or is a residential or commercial investment property. Many similar considerations apply to construction and development finance and security.

Mortgage security over property gives the lender property rights over the asset concerned. Property rights give the mortgagee sufficient "ownership" to enable the mortgaged assets to be sold in the event of enforcement. Because a mortgage gives property rights to the lender, many aspects of its creation, validity and priority are determined by property law rules.

In this guide, the word "mortgagor" is used to refer to the "chargor" (i.e. the borrower) granting the charge. The word "mortgage"

refers to a Land Registry charge and the word "mortgagee" is used in most cases to refer to a mortgagee or charge holder (i.e. usually a financial institution) taking the charge. These are the everyday descriptions which are usually used, even though the strict position is slightly different. There is no practical difference between a charge and a mortgage.

Regulatory

Chapters 3 to 6 deal with UK and / or Irish regulatory issues which may apply to loan management and enforcement.

Chapter 3 deals with UK regulation of lending. If there is no connection with the United Kingdom other than the presence of the security there, there are likely to be no UK regulatory implications. Regulatory requirements may apply in Ireland.

UK regulation of mortgages is discussed in Chapter 4, largely for the purpose of identifying its limits and extent. If there is no connection with the UK, other than the presence of the secured property there, UK Regulation may not apply.

Chapter 5 deals with Irish Regulation and Consumer Protection. This will be relevant where the lending has been undertaken in Ireland. There are principles which apply to

dealings with all customers and to consumers (including small businesses) which are of significance in loan management and enforcement. Chapter 6 deals with the Irish Consumer Credit Act. There are provisions in relation to housing loans and certain other non-housing consumer loans which may be relevant to the variation and enforcement of loan agreements and security.

Irish Regulation is enforced by the Financial Regulator and through complaints by consumers to the Financial Services Ombudsman. The relevant standards go beyond legal rules and prescribe standards of fairness and reasonableness etc. The regulatory standards must be borne in mind in all dealings with consumers.

Loan Agreements and Security

Any variation agreement or arrangement or enforcement must start with an understanding of the current position. The starting point for the lender's legal rights and obligations is the existing loan agreement and mortgage terms and conditions. Typically, in a loan management and enforcement scenario, there will have been a breach of the agreements.

Chapter 7 gives an overview of loan agreements. The loan agreement is the

legally binding contract setting out the terms on which money has been lent and is to be repaid

Chapter 8 gives an overview of mortgage security in the context of property law. It deals with the process by which a first legal mortgage or "charge" is put in place and the practice regarding certificates of title and legal due diligence whether by the borrower's solicitor certifying title or by investigation the lender's solicitor.

Chapter 9 looks at standard mortgage provisions. The mortgage document is a legally binding agreement between the borrower and lender. The terms and conditions of the loan agreement and the lender's mortgage deed largely decide the lender's rights in relation to the management and enforcement of the security.

Issues with Security

A borrower may create a number of mortgages over the same asset, either with or without the first mortgagee's consent. Issues of priority of entitlement arise in relation to further advances made, after the second mortgage is put in place. Where a borrower is in financial difficulties, a second mortgage over another asset or other security may be offered. Conversely the lender may encounter second mortgages

and priority issues in relation to its own security. These may limit the lender's priority. Chapter 10 deals with issues of priority of entitlement to secured assets, where there is more than one security holder.

Chapter 11 sets out certain legal principles which may assist lenders. The existence of cross security and "all sums due" charges can widen the available security. The principles of consolidation and marshalling can be of assistance to a lender when a mortgagor is seeking to redeem a security in a manner which might leave the lender exposed. Second mortgagees have certain rights to redeem earlier mortgages and improve their security position. "Quistclose" trusts and subrogation may improve the lender's security.

Chapter 12 looks at security over non-property assets. The borrower may offer additional security over non-property assets. Many loans which are primarily secured on property may already provide for other security, such as a charge on a life policy, bank account or shares.

Chapter 13 looks at various circumstances and factors which may invalidate or limit the effectiveness of a mortgage security. It discusses matters which may be raised by borrower by way of a defence or in an

attempt to bargain down the strength of the lender's positions. Most of these issues should be covered by the initial due diligence on taking the security, either by the lender's solicitor's investigations or under the borrower's solicitor's certificate of title.

Chapter 14 deals with mortgage securities granted by companies. Special procedures and registration requirements apply to the grant of a mortgage by a company. Companies, unlike individuals can grant a floating charge over all their business assets.

Chapter 15 looks at guarantees which may be available or may be offered to bolster existing security. Guarantees raise a host of legal issues and are particularly vulnerable to challenge.

Enforcement of Security

Chapter 16 gives a brief overview of the lender's enforcement rights over security, which "kick in", in the event of default. The more important rights are then dealt with in more detail in the following chapters.

Chapter 17 deals with the rights of a mortgagee to possession. Possession may have been obtained by surrender by the borrower, by a peaceful entry or under a court order. Possession may be readily

available in the case of rented properties, where possession involves receipt of the rents, rather than physical possession.

Chapter 18 discusses fixed charge or Law of Property Act (LPA) receivers. An LPA receiver is a useful mechanism which allows a lender to enforce a security using a third party agent. The lender has less onerous responsibilities than when it takes possession itself. A fixed charge receiver may simply receive rents and pay them to the lender. Depending on the powers in the mortgage deed, the LPA receiver may be entitled to sell the mortgaged property in order to repay the mortgage debt.

Chapter 19 deals with the rights and obligation of a lender in possession of a mortgaged property. Possession carries certain risks and costs for the lender. A cost v benefit comparison with a fixed charge receiver may be appropriate. Possession may be a longer or shorter term strategy. The lender may wish to be let out property to generate income. It may wish to improve the property or complete development and construction works in order to enhance its value. Alternatively, possession may be a short-term strategy until the property is sold.

Chapter 20 deals with leases and tenancies of mortgaged property. In the case of a residential or commercial investment

property, the lender may be satisfied to enforce the mortgage with the existing lease of the property in place. The cash flows from the tenant may enhance the value of the security. In other instances, the lender may not have consented to the letting and may not be satisfied with it.

Enforcement of Security over Land and Buildings

Chapter 21 deals with a mortgagee's power of sale. This power gives a mortgagee a right to sell property free from all lower ranking security. The sale may be with vacant possession or with tenants in place. The mortgagee has considerable freedom to choose the timing and set the terms of sale, even if it is not the optimum time for sale, from the borrower's perspective.

The usual method to enforce mortgage security over property is to obtain a court order for possession, unless possession is available by surrender or peaceful entry. Once possession is procured, the lender may sell the property under the power of sale in its mortgage. The court is not involved in the sale. Chapter 22 deals with legal proceedings for possession of a mortgaged property

Provided the mortgage has been properly created and the borrower is in default, then

the lender should be entitled to possession as of right. In the case of residential property, the recent Pre-action protocol dealt with in Chapter 23, requires a lender to take certain steps, before taking legal action to repossess an owner occupied dwelling house.

There are special powers under the Administration of Justice act which allows courts to adjourn possession applications or suspend or make conditional possession orders, in the case of residential property. Chapter 24 discusses these powers.

Chapter 25 looks at Court Orders for sale. Generally, a Court Order for possession and private sale will be the normal means of enforcement. However, Court Orders for sale may be necessary where there is a defect in the security or where there is security over certain types of asset.

Other Enforcement

Chapter 26 deals with the enforcement of security over non-property assets. This includes shares, debts, intellectual property, accounts, contracts and moveable goods. A court order may or may not be necessary. This depends on the type of asset and the way the security was created.

Chapters 27 and 28 look at administrative receivers and administration. These are the principal means of enforcing security in England and Wales given by a company over its entire assets. Administrators have replaced administrative receivers in relation to mortgages signed after 15th September 2003. The administrative receiver or administrator can take control of the entire assets or a substantial part of the assets of a company.

The administrator has duties to endeavour to save the company's business, if possible. Only when these wider objectives are not achievable, can the objective of realising the security be undertaken. The law is significantly different to the corresponding Irish law.

Chapter 29 deals with Court receivers. Court receivers provide a useful mechanism to enforce certain types of security, particularly where there is a threat to the security itself. They are also appropriate where the ordinary security lacks sufficient teeth or flexibility.

Debt Collection

Chapter 30 deal with the legal procedures for debt collection in England and Wales. A court order should be readily available

declaring the borrower's personal liability to pay the debt, if so required. This opens the door to various means which exist to enforce court orders or judgments for money due. These may give significant additional options, where the security is not sufficient.

Chapter 31 deals with the enforcement of court orders / judgments in England and Wales. It covers enforcement of court orders for possession as well as the various methods to enforce a court order/ judgment for money due.

An England and Wales Court Order can be enforced against a borrower's assets in Ireland. Similarly, an Irish Court Order can be enforced against the borrower's assets in England and Wales. Chapter 32 deals with the cross border enforcement of court orders in the European Union. It is possible to obtain a charging order against a borrower's other assets.

Chapter 33 deals with the legal procedures for debt collection in Ireland. Although the secured property might be situated in England and Wales, the proper place for enforcing the loan agreement may be Ireland, where the loan is made and the borrower resides here.

Chapter 34 deals with the methods of enforcing judgments and court orders in

Ireland. This may be an Irish Court order or an English order which is recognised under EU law. Other assets of the borrower may be enforced against. It is possible to register a judgment mortgage against a borrower's other Irish assets.

Insolvency of the Borrower

Chapters 35 to 46 deal with issues relating to the borrower's Insolvency in England and Wales or in Ireland. Insolvency raises various issues for secured creditors. Generally, bankruptcy will be most significant risk where there is a shortfall on the security. In this situation, the rules in relation to various insolvency arrangements will be of critical importance.

If the borrower has ceased to make loan repayments there is a distinct possibility that that borrower may ultimately become bankrupt or be wound up. There are mechanisms in both Ireland and England and Wales in relation to the rescue of companies and non-bankruptcy or bankruptcy supervised arrangements with creditors.

A borrower's insolvency will not usually affect the lender's property rights to the mortgaged asset. However, insolvency has significant implications for the secured lender. Enforcement may be temporarily restricted. In some situations, the insolvency

official can sell or acquire the secured asset, but generally will have to account to the mortgagee for the proceeds of sale.

If there is a shortfall in the value of the secured asset, the lender will be an unsecured creditor in respect of this balance. English or Irish insolvency rules may apply to the borrower. Insolvency law is relevant to any additional security taken in the period before formal insolvency, as it may be set aside in some circumstances.

Chapter 35 deals with the interaction under between a lender enforcing a mortgage security and a bankruptcy trustee or liquidator acting in the insolvency of the borrower under English law. Chapter 36 deals with English personal insolvency. English bankruptcy law has been modernised and is less draconian than Irish bankruptcy law.

Chapter 37 deals with English individual voluntary arrangements. So called "IVAs" are a popular mechanism in England, by which creditors voluntarily agree to take a "hair cut" or reduction in the debt due to them, in the context of an overall arrangement with creditors. Creditors may accept an IVA where this may ultimately give them a better deal than bankruptcy.

Chapter 38 and 40 deal with the equivalent rules for companies. English Company Voluntary Arrangements are the equivalent of IVAs for companies. Chapter 39 deals with the order of entitlement to assets in an English insolvency.

Chapters 41 to 45 deal with the equivalent rules in an Irish insolvency. Chapter 41 deals with the implications under Irish insolvency law for the mortgagee. Chapter 42 and 43 deal with Irish personal bankruptcy and Irish personal insolvency arrangements outside of bankruptcy. These are relatively rare and not as flexible as the equivalent English IVA.

Chapter 44 deals with Irish company insolvency. Chapter 45 deals with examinership in Ireland. This is a legal mechanism to facilitate rescue of insolvent companies. It is the equivalent of administration and company voluntary arrangements in England and Wales.

Chapter 46 deals with cross border aspects of insolvency. This is of importance where the borrower has connections with both Ireland and England and Wales.

Certificates of title and adviser's responsibility

Chapters 47 to 49 deal with possible legal issues which may arise with professional advisers and service providers. Chapter 47 deals with principles of negligence and breaches of duty by solicitors, valuers and others. It also deals with the legal regulation of solicitors, professional indemnity insurance, the compensation fund and the Legal Service Ombudsman.

Chapters 48 and 49 deal with the two major forms of Certificate of Title that are commonly used in relation to the creation of security over English property. The Certificates of Title contain a wide range of promises in relation to legal compliance and other issues affecting the security. If there is a defect in the security, there may well be recourse under the terms of the Certificates of Title.

The Council of Mortgage Lenders Certificate of Title is almost universally used in owner occupier and residential investment property lending in England and Wales. This certificate is much more extensive than the equivalent certificate given in Ireland. Even where this certificate is not used, many individual lenders model their certificates on the CML standard certificate. Chapter 49 deals with the most common form of Certificate of Title used in relation to commercial property.

Variations, Workouts and Restructuring

Chapters 50 to 55 deal with various legal issues that arise in managing and varying non-performing loans. Chapter 50 deals with the legal issues surrounding forbearance and variation agreements. Chapter 51 deals with standstill agreements by which the lender, possibly in conjunction with other lenders, agree to provide breathing space in which proposals for a reconstruction or work out can be considered and undertaken.

A re-organisation can take place outside of insolvency legislation or under the auspices of examinership in the case of a company or voluntary arrangements in the case of an insolvent individual borrower. Chapter 52 deals with debt for equity swaps. Chapter 53 deals with agreements between creditors in relation to priority of their debts in winding up and of their respective securities.

Chapters 54 and 55 deal with practical legal issues which arise in relation to managing residential and commercial property security. Residential properties may involve more hands on management than commercial property. Issues will arise with repairs, rent collection, management companies, service charges, insurance, the renewal of letting agreements and rent collection. Commercial properties tend to be

a more hands off investment. The terms of the commercial lease and the circumstances of the particular property will be critical

Development Loans

Chapters 56 to 58 deal with issues in relation to development loans and uncompleted development projects. Chapter 56 deals with the terms and conditions commonly found in development loan agreements, mortgages and security documents. They should give the lender a variety of useful rights.

Chapter 57 looks at various rights under direct agreements, collateral warranties and step in rights, that are commonly found in practice. It also looks at other security over construction and project documentation. Chapter 58 deals with work outs and arrangements in the context of uncompleted developments.

Tax

Chapter 59 deals with the tax aspects of security enforcement. Tax can be an unexpected cost in enforcing security. Issues may arise in relation to both UK and Irish taxes. Insolvency officers may have obligations in relation to tax. In some instances, the effect of these obligations is

to give the Revenue priority for certain types of taxes.

NAMA

Chapter 60 and 61 deal with the proposed National Asset Management Agency, in so far as it relates to loans and security in England and Wales. Irrespective of the final shape of the legislation, it is likely that a "bad bank" type agency will be set up with "super" enforcement powers over development and other loans.

Chapter 60 looks at the process for transferring loans from the banks to NAMA. Chapter 62 looks at NAMA's rights and powers. NAMA's full powers will not apply in so far as the security is situated outside Ireland.

Lavelle Coleman is an Irish firm of solicitors with an England and Wales legal practice. Our England and Wales qualified and regulated solicitors provide a wide range of legal services from our Dublin offices. We have written legal guides in relation to a broad range of England and Wales legal matters as they relate to Irish based individuals and businesses. These guides are available on our website at <http://www.lavellecoleman.ie/England-Wales-Law.aspx>

This is an extract from our "Legal Guide to the Management and Enforcement of Security in England and Wales for Irish Lenders (2009). The Guide is intended as an overview and broad outline of the matters covered in it. Its purpose is to inform and raise awareness. We are happy to offer specific legal advice on particular circumstances. It should not be relied on as a substitute for comprehensive legal advice with reference to the particular circumstances. While we have taken due care in the preparation of this publication, we do not accept legal liability as a result of any reliance placed on anything in it. The reader should rely only on specific legal or taxation advice. This extract is based on the law as of 1st August 2009.

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